STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MALCOLM THURGOOD KINCHLOE, and SHAWN MONTE KINCHLOE, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ZELMA SHIRLEY KINCHLOE,

Respondent-Appellant.

UNPUBLISHED
September 18, 2003

No. 245315
Wayne Circuit Court
Family Division
LC No. 93-311406

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights the minor children pursuant to MCL 712A.19b(3)(a)(*ii*), (b)(*i*), (b)(*ii*), (c)(*i*), (g), (j) and (k)(*ii*).[1] We affirm.

Respondent argues that the trial court erroneously admitted evidence of her statement to the police, the notes of a doctor who examined the children, and the foster mother's letter repeating statements made by the children concerning acts of sexual abuse. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

MCR 5.972(C)(2)[2] provides as follows:

[1] Although the court failed to specify the applicable subpart of subsection (k), it is clear from the context of its decision that it relied on subpart (*ii*).

[2] The court rules governing child protective proceedings were amended and recodified as part of new MCR subchapter 3.900, effective May 1, 2003. This opinion refers to the rules in effect at the time of the trial court's decision.

> A statement made by a child under ten years of age describing an act of child abuse . . . performed with or on the child, not otherwise admissible under an exception to the hearsay rule, may be admitted into evidence at the trial if the court has found, in a hearing held prior to trial, that the nature and circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness, and that there is sufficient corroborative evidence of the act.

Here, respondent's attorney specifically consented to allowing petitioner to present the foster mother's letter containing the statements, rather than calling the foster mother to testify. The foster mother was then excused as a witness, without objection. For this reason, there was no testimony as to whether "the nature and circumstances surrounding the hearsay statements provided adequate indicia of trustworthiness." *In re Brimer*, 191 Mich App 401, 405; 478 NW2d 689 (1991). However, by consenting to the letter being submitted in lieu of receiving the foster mother's testimony, and by excusing the foster mother as a witness, respondent waived any error concerning a failure to present adequate indicia of trustworthiness. While petitioner had the burden of establishing admissibility under MCR 5.972(C)(2), respondent consented to the evidence not being presented. It is well established that "error requiring reversal cannot be an error that the aggrieved party contributed to by plan or negligence." *Farm Credit Services, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998). Accordingly, we reject defendant's contention of error. *Waknin, supra* at 332.

In addition, neither the doctor's notes, nor respondent's statement, contain any statements made by the children. Respondent's statement to the police was an admission of a party-opponent and, therefore, was not hearsay. See MRE 801(d)(2)(A). While we believe the notes from the children's medical examinations were admissible as the doctor's present sense impressions, see MRE 803(1), the record indicates that they were admitted without objection, subject to cross-examination, which was then waived. Therefore, the trial court did not abuse its discretion in admitting these exhibits into evidence. *Waknin, supra* at 332.

We also reject respondent's argument that the evidence was insufficient to establish a statutory ground for termination. Where termination of parental rights is sought, the existence of a statutory ground for termination must be proven by clear and convincing evidence. MCR 5.974(A) and (F)(3); *In re Miller*, 433 Mich 331, 344-345; 445 NW2d 161 (1989); see also MCL 712A.19b(1). The trial court's findings of fact are reviewed for clear error and may be set aside only if the reviewing court is left with a definite and firm conviction that a mistake has been made. MCR 5.974(I); *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996). Due regard is given to the trial court's special opportunity to judge the credibility of witnesses. MCR 2.613(C); *Miller*, *supra* at 337.

Petitioner concedes that there was no evidence to support termination under § 19b(3)(a)(*ii*) (abandonment). The trial court clearly erred in terminating respondent's parental rights under this subsection.

The court did not clearly err, however, in finding that the remaining statutory grounds for termination were each established by clear and convincing evidence. Due to respondent's cognitive limitations, she was unable to sufficiently benefit from the services she received. Although respondent had separated from the children's father, she admitted that there was a man who occasionally stayed at her home whose name she did not know. The evidence sufficiently

demonstrated that respondent was unable to appreciate potential risks to the children and remained unable to protect the children from others, thereby supporting the trial court's decision to terminate her parental rights under §§ 19b(3)(b)(*ii*), (c)(*i*), (g), and (j). In addition, the children's statements provided clear and convincing evidence of grounds for termination under §§ 19b(3)(b)(*i*) and (k)(*ii*).

Concerning the children's best interests, the evidence showed that the children had more behavior problems after visits. These problems improved after visitation was stopped. There was also evidence that, while respondent tried to engage the children during visits, they became bored and wanted to leave. The younger child apparently felt that respondent favored the older child, and sometimes refused to see her. The evidence failed to show that termination of respondent's parental rights was clearly contrary to the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 353-354, 356; 612 NW2d 407 (2000).

Affirmed.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette